

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**LEONARD MCFARTHING**  
Claimant

VS.

**THE BOEING COMPANY**  
Respondent

AND

**INDEMNITY INS. CO. OF NORTH AMERICA**  
Insurance Carrier

Docket No. 1,026,478

**ORDER**

Respondent and its insurance carrier (respondent) request review of the April 27, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

**ISSUES**

The Administrative Law Judge (ALJ) ordered the respondent to pay temporary total disability (TTD) benefits commencing January 17, 2007 until claimant is released by the authorized treating physician.

The respondent requests review of this order arguing that the ALJ exceed his jurisdiction in granting TTD because the claimant is receiving retirement benefits. And based upon K.S.A. 44-501(h), respondent contends that claimant is not entitled to a double recovery of wages. In other words, he is not suffering any wage loss as he continues to receive retirement benefits in lieu of his normal pay. So, respondent argues claimant should not receive additional duplicative TTD benefits.

Claimant responds by saying that there is no jurisdiction for this appeal. And even if there were, claimant has not yet retired from the workforce altogether and was (until surgery) continuing to look for alternative employment. Following surgery, he has been unable to work and is therefore entitled to TTD benefits. Accordingly, claimant contends the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.<sup>1</sup>

None of the jurisdictional bases listed in K.S.A. 44-534a are involved in this appeal. Rather, respondent argues that the ALJ exceeded his jurisdiction in awarding TTD benefits because claimant is receiving retirement benefits. After considering the parties' arguments, this Board Member finds that the ALJ did not exceed his jurisdiction. The statute respondent refers to as justification for not paying TTD, K.S.A. 44-501(h), speaks to benefits aimed at wage replacement in connection with *permanent* injuries. K.S.A. 44-501(h) has not, up to now, been interpreted as requiring an offset against TTD or serve as a total bar to such benefits. Accordingly, the respondent's appeal is dismissed for lack of jurisdiction.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>2</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

---

<sup>1</sup> See K.S.A. 44-551.

<sup>2</sup> K.S.A. 44-534a.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated April 27, 2007, is dismissed for lack of jurisdiction.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2007.

\_\_\_\_\_  
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant  
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge